

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Marcus P's Diner Plus LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid vacation pay
RSA 279:21 VIII unpaid overtime wages

Employer: Marcus P's Diner Plus LLC, 47 Spindleback Ln, New Ipswich, NH 03071

Date of Hearing: February 2, 2017

Case No.: 54369

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant originally asserted, through the filing of her wage claim, that she was owed:

- \$264.87 in unpaid wages for breaks of less than twenty minutes which the employer failed to pay;
- \$3,914.00 in invalid tip credits;
- \$45.60 in unpaid overtime pay;
- \$463.33 in penalties for being uninsured; and
- \$955.20 in unpaid wages for "side work" which she argues should be paid at full statutory minimum wage, rather than her subminimum waitstaff rate.

At the hearing, the claimant removed issue of \$3,914.00 in invalid tip credits as it does not fall within the jurisdiction of this Department.

The employer denies the claimant is due any of the claimed wages. She was fully and correctly paid for all time worked.

FINDINGS OF FACT

The claimant worked for the employer as a waitress. She received the allowable tipped employee base rate of \$3.27 per hour.

The claimant argues she was required to carry the employer's phone with her during her lunch periods and the phone always rang, causing her to perform work on her

unpaid breaks. She argues she should be paid for three hundred twenty-four fifteen minute breaks.

The employer argues the claimant was not responsible for the phone on her breaks nor was she authorized to take the phone on her breaks. The claimant always had coverage for her breaks and was never left alone.

The Hearing Officer finds that the claimant testified as credibly, not more credibly, than the employer. The claimant has the burden of proof in this matter to show by a preponderance of the evidence that she was not paid for all hours worked. The Hearing Officer finds that the claimant failed to meet that burden of proof as her story is only as credible as, not more credible than, the employer's. The claimant, therefore, fails to prove by a preponderance of the evidence that she is owed the claimed wages.

The claimant argues she is due \$45.60 in unpaid overtime wages. She agrees she received \$20.00 in cash, but is due the balance of \$45.60.

The employer provided credible testimony and evidence that the claimant had received cash payments for overtime, which was duly recorded for payroll purposes.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence she is due the claimed overtime pay.

The claimant argues she is due \$463.33 for an uninsured penalty which she received because she did not have health insurance. She contends the employer should have provided her healthcare coverage.

The employer argues they are exempt from the federal requirement to offer health insurance because they employ fewer than fifty employees.

The monies sought by the claimant for this issue is not considered wages under RSA 275:42 III. Further, this Department does not have jurisdiction over a federal mandate for health insurance, nor any associated penalties.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence she is due the claimed employee expenses for health insurance penalties.

The claimant argues the employer required her to perform "side work", which were duties unrelated to her wait staff duties. Therefore, she argues the employer should pay the full statutory minimum wage rate of \$7.25 per hour, rather than the subminimum tipped employee rate of \$3.27. Further, she argues the employer's failure to pay the full minimum wage is in violation of the Fair Labor Standards Act.

This Department does not have jurisdiction over the requirements of the Fair Labor Standards Act for this issue.

There are no requirements under New Hampshire statutes to require an employer to pay a tipped employee the full minimum wage rate of \$7.25 for hours spent on "sidework" or duties other than waiting tables.

The Hearing Officer finds the claimant failed to prove by a preponderance of the evidence she is due the claimed wages for "sidework".

DISCUSSION

The burden of proof lies with the claimant in these matters. The claimant has the burden to prove by a preponderance of the evidence that the claimed wages are due. Proof by a preponderance of evidence as defined in Lab 202.05 means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The Hearing Officer finds the claimant failed to meet her burden in this claim.

DECISION

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that she is owed the claimed wages, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:43 V considers the payment of employee expenses to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that she is not due the claimed employee expenses, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:43 I requires that an employer pay all wages due an employee and RSA 279:21 VIII requires an employer to pay time and one half of an employee's regular rate of pay for all time worked in excess of forty hours, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that she is owed the claimed unpaid overtime wages, it is hereby ruled that this portion of the Wage Claim is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: March 1, 2017

Original: Claimant
cc: Employer

MJD/das